

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HAGOP YEGNUKIAN	:	
OFFICER OF MASSIS AUTO CORP.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1981	:	
through May 31, 1981.	:	

DETERMINATION

In the Matter of the Petition	:	
of	:	
MASSIS AUTO CORP.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29 :	:	
of the Tax Law for the Period March 1, 1981	:	
through May 31, 1981.	:	

Petitioners, Hagop Yegnukian, 33-21 83rd Street, Jackson Heights, New York 11378, and Massis Auto Corp., 49-01 Northern Boulevard, Long Island City, New York 11101, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through May 31, 1981 (File Nos. 802957 and 802958).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 21, 1988 at 1:15 P.M., with all briefs to be submitted by August 4, 1988. Petitioner Hagop Yegnukian appeared by Garo Yegnukian. Petitioner Massis Auto Corp. appeared by Hagop Yegnukian. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioners timely filed petitions for an administrative hearing to contest sales and use tax deficiencies assessed pursuant to the issuance of notices of determination and demands for payment of sales and use taxes due which were issued to petitioners by the Division of Taxation.

FINDINGS OF FACT

1. On May 3, 1985, the Division of Taxation issued to petitioner Hagop Yegnukian, officer of Massis Auto Corp., a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due in the amount of \$15,789.50, plus penalty and interest, for a total amount due of \$28,830.83 for the period March 1, 1981 through May 31, 1981. On the same date, the Division of Taxation issued a notice of determination to Massis Auto Corp. (hereinafter "the corporation") in the identical amount for the identical period. The notice of determination issued to Hagop Yeghukian was sent, by certified mail, to said petitioner at his residence at 33-21 83rd Street, Jackson Heights, New York 11372. At the time of the issuance of the notice of determination, Mr. Yeghukian did reside and, for a number of years prior thereto, had resided at the aforesaid Jackson Heights address. The notice of determination issued to the corporation was sent, by certified mail, to its last known address and the address as set forth on the last sales and use tax return filed by the corporation, i.e., 49-01 Northern Boulevard, Long Island City, New York 11101.

2. Prior to the issuance of the aforesaid notices of determination, the Division of Taxation, on November 20, 1984, issued to the corporation a Consent to Fixing of Tax Not Previously Determined and Assessed which asserted additional sales and use taxes due in the amount of \$84,670.60, plus penalty and interest, for a total amount due of \$125,310.70 for the period March 1, 1981 through February 28, 1982. In response to the issuance of this document, the corporation's then representative, Elliot Sagor, Esq., prepared form TA-11, Petition, which was dated February 15, 1985. Mr. Sagor sent the petition to the auditor, Astreal LaMarque. On February 21, 1985, Mr. LaMarque sent a letter to Mr. Sagor which advised him that the corporation's petition was premature since a statutory notice had yet to be issued.

3. On April 8, 1985, the corporation sold the gasoline, oil and auto repair business located at 49-01 Northern Boulevard, Long Island City, New York to William Gonzalez. At the time of the issuance of the notice of determination to the corporation, said corporation was no longer in business at this address. Garo Yeghukian, representative of petitioner Hagop Yeghukian, alleges that he notified the Division of Taxation that all future correspondence directed to the corporation should be sent to the home address of Hagop Yeghukian, although no proof of said notification of address change was produced herein.

4. It is uncontroverted that the notice of determination sent to the corporation by certified mail on May 3, 1985 was returned to the Division of Taxation as undeliverable. The notice of determination issued to Hagop Yeghukian was not returned to the Division of Taxation although this petitioner does not recall ever having received said document.

5. Petitioners received a collection letter dated October 22, 1985 from the Tax Compliance Division of the Department of Taxation and Finance. On November 29, 1985, a warrant was filed in the office of the Clerk of the County of Queens against petitioners in the amount of \$15,789.50, plus penalty and interest, for the taxable period ending May 31, 1981. Petitioners thereupon contacted Robert Farrelly, the conferee who, at that time, had been involved with these petitioners relative to other taxable periods for which petitions had been filed. Mr. Farrelly advised petitioners to send him a letter of protest setting forth all relevant facts leading up to the filing of the aforesaid warrants. On December 23, 1985, Hagop Yeghukian sent such letter of protest, dated December 20, 1985, along with a copy of the petition originally sent to Mr. LaMarque (dated February 15, 1985). The letter and petition were received by the Tax Appeals Bureau on December 27, 1985.¹

¹It should be noted that an additional copy of this letter sent to Robert Farrelly and a copy of the petition of the corporation were determined by the Tax Appeals Bureau to constitute the original petition and/or protest

CONCLUSIONS OF LAW

A. Tax Law § 1147(a)(1) provides as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

B. Tax Law § 1138(a) (former [1]), in effect for the period at issue, provided, in pertinent part, as follows:

"Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same."

C. A taxpayer has the right to rebut the presumption of receipt contained in Tax Law § 1147(a)(1) and, if successful, the 90-day period for filing a petition will commence to run as of the date of actual receipt of the notice (Matter of Ruggerite v. State Tax Commn., 64 NY2d 688).

D. The notice of determination issued to petitioner Hagop Yegnukian was properly mailed, by certified mail, to said petitioner's current home address. While he contends that he does not recall receiving such notice, he has failed to rebut the presumption of receipt. Since the notice of determination was issued to this petitioner on May 3, 1985 and no petition or letter of protest was sent by petitioner until December 23, 1985, the tax assessed pursuant to such notice of determination is finally and irrevocably fixed and such petitioner is not entitled to an administrative hearing on the merits of the assessment.

E. The notice of determination issued to the corporation was returned to the Division of Taxation as being undeliverable. While the Division of Taxation may well have properly mailed such notice, by certified mail, to this taxpayer at the address given on the last return filed by it and, while the Division of Taxation may not have received proper notice of a change of address on behalf of the corporation, the evidence produced herein clearly indicates that the corporation did not receive actual notice of the assessment until October 22, 1985 when a collection letter

letter for each petitioner herein. By letter dated February 4, 1986 to Hagop Yegnukian, the Tax Appeals Bureau advised Mr. Yegnukian that, since a petition or protest letter for each petitioner was not mailed until December 23, 1985, the petitions were untimely and the matters were being referred to the Tax Compliance Bureau for collection.

was received from the Tax Compliance Division. Since the 90-day period for the filing of a petition seeking an administrative hearing did not commence to run until October 22, 1985 (the date of actual notice), the filing of said petition on December 23, 1985 is, therefore, timely and this taxpayer is entitled to a hearing on the merits of its case as raised in its petition.

F. The petition of Hagop Yegnukian is dismissed and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on May 3, 1985 is sustained in its entirety.

G. The petition of Massis Auto Corp. is granted to the extent that the Division of Tax Appeals shall, with respect to the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to said petitioner on May 3, 1985, schedule said matter for an administrative hearing and for further proceedings not inconsistent herewith.

DATED: Albany, New York

October 6, 1988

/s/ Brian L.

Friedman _____
ADMINISTRATIVE LAW JUDGE